

Opening Statements

I. What is Opening Statement?

A. The law says the purpose of an opening statement is:

1. To inform the court and jury of regarding the general nature of the case;
2. To outline the anticipated proof;
3. To indicate the significance of what will be presented at trial; and
4. To show the jury what you believe will come into evidence during the trial.

II. Why is an opening statement important for you?

Because while you almost certainly cannot win a case based solely on your argument, you can easily lose your case in that fashion.

III. Preparation

- A. This outline presupposes that you have studied and adhered to the suggestions included in "Chapter 1: Preparation." This includes getting familiar with the law, gathering of all possible facts, brainstorming and development of a Trial Plan.
- B. Do not wait until the moment for delivery and give an impromptu opening statement. It is important and must be thought out and prepared.

IV. Determining Whether to make an Opening Statement

- A. There are able trial attorneys who say to always make an opening statement and those who say it depends on the individual case.
- B. You cannot make this determination by applying a rote rule.
- C. Whether you make an opening statement can only be determined by making a judgment as to whether doing so will aid or hinder you in getting the desired verdict. That judgment can only be made on a case-by-case basis after weighing all relevant factors. In one case an opening statement may be helpful and in the next case it may not be helpful.
- D. Factors in favor of making an opening statement.
 - 1. The principle of primacy is the psychological principle that what we hear first is most likely to be remembered and followed.
 - 2. The jury may feel you do not have a defense.
 - 3. The jurors may have made up their minds to the point where it is difficult to change their feelings.
 - 4. Studies have shown that there is a strong correlation between the judgment of jurors after the opening statements and their final verdicts.
 - 5. Make an opening statement in cases where you are going to ask the jury on closing to view the evidence in a certain light. It gives the jury a perspective from which to view the evidence early on in the case as opposed to having to look back.
- E. Factors militating against giving an opening statement.
 - 1. You may wish not to give away your defense so early.

2. You or your opponent may not be sufficiently prepared to be sure what the evidence and issues will be.
3. It takes away from flexibility. You may lose credibility if you ultimately takes a different position from that set out in your opening statement.
4. Witnesses may not be available or the evidence may be different than anticipated.
5. A brief general opening statement (so made to avoid taking any position) may come across to the jury as too noncommittal.
6. Opposing counsel may believe she has a device with which to establish the initiative and try to maintain momentum to carry it through the rest of the trial. Postponing your opening may interfere with the psychological effect of this strategy.

V. Determining Whether to Reserve Opening Statement

- A. Once again, this determination is made on a case-by-case basis on the basis of what best advances the Trial Plan to gain the desired verdict.
- B. Factors favoring reserving opening statement.
 1. It postpones the decision until after the prosecution's case so one is deciding after knowing, not just speculating about, what the prosecution's case is.
 2. You can then meet specifically the prosecution's case and deal with particular contentions or bits of evidence.

3. Reserving provides the ultimate in flexibility.

C. Factors against reserving opening.

1. The prosecution has been able to put on its whole case before any reply and the jury may be persuaded before it even hears from the defense.
2. It may appear to the jury that you waited and "tailored" the defense position to meet the prosecution case, casting doubt on the credibility of your defense.

VI. Scope of the Opening Statement

- A. It should be a statement, not argument, and outline the issue and the evidence.

1. "In his opening statement a lawyer should confine his remarks to a brief statement of the issues in the case and evidence he intends to offer which he believes in good faith will be available and admissible. It is unprofessional conduct to allude to any evidence unless there is a good faith and reasonable basis for believing such evidence will be tendered and admitted in evidence."

ABA Standards Relating to the Prosecution
Function and the Defense Function, §7.4.

- B. Meeting the requirement that the statement be brief is sound psychologically.

1. Inexperienced attorneys seem to feel that the longer they talk the more they deserve to win. They feel that each phase of the trial must be attacked as if it were the last. Sound psychology requires instead starting lower key and building to the climactic closing argument.

- C. Tip: If you don't get at least one objection from the prosecutor or a sua sponte admonition from the court during your opening indicating that you have "gone too far" it is very likely that you have not gone far enough.

VII. Manner of Opening Statement

- A. The law requires a statement, not argument, but that is also sound psychologically.
1. Inexperienced counsel often want to argue in opening as if it were the last chance.
 2. Sound psychology calls for a gaining of credibility before argument and a gradual building during trial to the climactic closing argument.
- B. The manner of giving the opening statement should show qualities of stature, maturity and credibility:
1. Begin at the end ! Weave the theme of your closing argument into your opening statement. Remember: you are going to get to talk directly to the jury only one other time, and that is at the end of the trial.
 2. Be sincere and honest.
 - a. A sincere speaker can win a sympathetic hearing even from jurors inclined to be difficult to convince.
 3. Be simple and natural.
 - a. Undue emotionalism suggests to the jury that you may be trying to cover up weaknesses in your case.
 4. Use soft sell.

5. Don't be argumentative.
6. Be contemplative and serious.
7. Have confidence that the verdict will be favorable once the jurors have heard the evidence.
8. Use nothing that appears to be a legal technicality or reflects that you are a shyster in any way.
9. Don't use glittering verbal showmanship which may undermine jurors' confidence in the sincerity and integrity of the attorney.

C. Treat opening statement as important.

1. "Ladies and gentlemen of the jury" is often thrown away because thought is on the substance. Say it meaningfully to the jury, then pause and you will have their full attention.

VIII. Content of the Opening Statement

- A. Do *not* have a series of "The evidence will show. . ." followed by bits of evidence.
- B. Tell a story. It is as if you said, "Once upon a time . . ." and then told what happened that caused your client to be falsely accused.
- C. The most important purpose of the opening statement may be to "paint the picture" of the defendant as an innocent victim of circumstances so that the jury will *identify* with him and his situation of being falsely accused.
- D. Humanize the defendant. He has a wife named Ellen and three children. He went to high school right here in Mayfair, etc.

- E. Bolster your witnesses by showing they are not the kind of people who would lie, etc.
- F. Choose whether to have a detailed opening statement, one more vague, or one that merely asks the jury to keep an open mind. Choose on the basis, not of how one usually does it, but of what best advances the defense in the case.
- G. Do not make statements that may be wrong or not supported by the evidence. If anything, understate.
- H. Do not say that what you have to say is not evidence. It detracts from the central theme of your case.
- I. Miscellaneous considerations.
 - 1. Do you make any admission(s) to gain credibility and take an embarrassing issue out of the case?
 - 2. Do you "take the sting out" of evidence by revealing it and putting it out on the table?
 - 3. Flag waving arguments:
 - a. Our system of justice.
 - b. Power of jurors
 - c. Promises on voir dire.
 - d. Burden of proof.
 - e. Presumption of innocence.
 - f. Reasonable doubt.

g. Put the jury in the client's place.

h. The indictment process.

4. Mention instructions the Court will give.

J. Affirmative presentation.

K. Have an ending prepared so you can finish effectively and end on a high note.

IX. Dealing with Opening Statement of Prosecution

A. Exclude witnesses before opening statements.

B. LISTEN carefully to the prosecutor's opening. Sometimes (often) the prosecution's opening statement will be some of the stuff they haven't told you yet.

C. Be alert to prosecution getting into inadmissible matters such as other crimes, the prosecutor's personal opinion, law and order argument, violation of prior court order in limine, etc.

1. Have available the law of the jurisdiction to prevent this.

D. Don't fall into the trap of being too defensive about what the prosecutor said. Come across so as to convey the idea that it will all be dealt with in due time.

X. Some Examples of Opening Statements

A. October 25th was a Friday. Johnny Jones went to work, came home about 5:30, and got out of his car in his driveway. He started to pick up the newspaper off the lawn when all at once he was surrounded by police with guns and told to get up against his house. He asked what was wrong. They told him, "Never mind. Just get with it."

They asked if he would consent to search his car and his house. They told him he didn't have to consent. He told them to go ahead. They searched and found nothing that related to any robbery, but they took him to the police station anyway.

At the police station, they held a line up. There was a lady there—Mrs. Edwards. Mrs. Edwards is not a bad person and honestly believes she is right. Mrs. Edwards picked Johnny out of that line-up, but the evidence will show that she was mistaken.

At the end of this trial we will be asking you for a verdict of not guilty because Johnny Jones is not guilty.

B. Like in anything else, someone has to go first and in a trial the prosecution gets to go first. All I ask is that you wait until you've heard our side before making up your mind.

C. Members of the Jury, the prosecutor has just made a number of statements that he promises to prove. Please bear them in mind throughout the trial. It will eventually be for you and you alone to decide whether he has fulfilled these promises by his "proof."

From *Do You Solemnly Swear?* By Louis B. Heller

D. You have heard the prosecuting attorney state his case. Now I ask you to watch carefully to see whether, in fact, he succeeds in establishing it beyond a reasonable doubt. The defendant, by his plea of not guilty, has denied having committed the crime. He still denies his guilt.

From *Do You Solemnly Swear?* By Louis B. Heller

E. Ladies and Gentlemen of the Jury, the purpose of the opening statement is to acquaint a jury generally with the nature of the case so that the Court and the jurors may intelligently follow the testimony as it comes from the lips of the witnesses. What the prosecutor has just told you is nothing more than what is client or

someone else told him and what he expects to prove. But sometimes, you know, the things clients tell a lawyer are not supported by evidence. They tell you things they hope to prove. Therefore, I ask you to follow the testimony closely to see whether the prosecutor really proves his contention.

From *Do You Solemnly Swear?* By Louis B. Heller

- F. Gentlemen of the Jury, the charge against the prisoner is murder, and the punishment for murder is death; and that simple statement is sufficient to suggest to us the awful solemnity of the occasion which brings you and me face to face.

John Inglis, attorney for Madeline Smith before the High Court of Justiciary at Edinburgh, July 8, 1857. Cited in *Do You Solemnly Swear?* By Louis B. Heller